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No. 93-651

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION,
Petitioner,

v.

SHRADER & YORK,
A TEXAS PARTNERSHIP IN DISSOLUTION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR LEE H. HENKEL III

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QUESTION PRESENTED

Whether a tort claim that was time-barred by applicable state law prior to its assignment to the federal government remains time-barred in the hands of the FDIC as assignee.

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STATEMENT OF THE CASE

1. *Background.* In 1988, the Federal Home Loan Bank Board determined that two Texas thrifts, City Savings & Loan Association ("City") and Lamar Savings Association ("Lamar"), were insolvent; it appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") to act as their receiver. *Id.* at 3a. Shortly thereafter, "[t]he FSLIC-Receiver sold to the FSLIC, in its corporate capacity, City and Lamar's claims against professionals providing services to these thrifts." *Id.* Petitioner Federal Deposit Insurance Corporation ("FDIC") subsequently acquired those tort claims by

operation of section 401 of the Financial Institutions, Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), 103 Stat. 354. *Id.*

In 1991, the FDIC brought this action for legal malpractice, acting in its corporate capacity as "manager of the FSLIC Resolution Fund." Pet. 5 n.2. The FDIC alleged that respondent Shrader & York, a law partnership, had been negligent in its representation of the thrifts in connection with five commercial transactions that were completed during the years 1983 through 1985. Specifically, the FDIC contended that Shrader & York negligently failed to advise the thrifts "to obtain regulatory approval" for the transactions, Pet. App. 26a, that the transactions resulted in losses, and that "if Shrader & York had alerted the City and Lamar boards of the illegal nature of the five transactions, the boards would have blocked the transactions, thereby averting [the] losses." *Id.* at 4a. The FDIC did "not allege that Shrader & York committed intentional torts, or conspired . . . to defraud City or Lamar." *Id.* at 25a.[1]

2. *The decision of the district court.* The district court granted summary judgment for the respondents. The court reasoned that Stanley E. Adams, Jr., who directly or indirectly controlled both thrifts and was the "driving force" behind the transactions, had contemporaneous knowledge of the facts relating to the alleged legal malpractice, that his knowledge was properly imputable to the thrifts, and that the causes of action thus had accrued

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[1] The FDIC named respondent Lee H. Henkel III, a partner in Shrader & York, as one of several defendants, apparently on a theory of vicarious liability. The summary judgment proof established that Henkel was not the partner with client responsibility for the thrifts; that he was not materially involved in the representation of the thrifts; that he has no expertise in, and did not advise the thrifts regarding, regulatory matters; that he has no knowledge of any legal advice provided by Shrader & York to the thrifts with respect to the transactions at issue; and that he was not involved in the management of the firm.

no later than 1985. *Id.* at 28a. The court concluded that the claims of legal malpractice had been barred by the applicable Texas two-year statute of limitations no later than 1987, well before the FSLIC and then "the FDIC took over City and Lamar and acquired the claims." *Id.* at 27a.

In response to the FDIC's contention that FIRREA "preempts the Texas statute of limitations and acts to 'revive' the FDIC's claims against the law firm," the district court stated that it had found no "legal authority to support the notion that FIRREA 'revives' barred claims," and that "[i]n the absence of such authority, the Court declines [the FDIC's] invitation to adopt a rule whereby the FDIC's acquisition of a failed institution would revive a claim even though it might be 20 or 30 years old." *Id.* at 28a-29a.

3. *The decision of the court of appeals.* The Fifth Circuit affirmed. The court of appeals, agreeing with the district court, began with the observation that FIRREA "does not revive stale state law claims acquired by the FSLIC or FDIC." *Id.* at 7a. The court therefore reasoned that because "[t]he Texas limitation period for legal malpractice claims is two years," and "the occurrences giving rise to the legal malpractice claims against Shrader & York took place well before May of 1986," the claims all had expired before they were acquired by the FSLIC in "May of 1988 unless one of the equitable doctrines urged upon us by FDIC operates to extend the limitation period." *Id.*

The FDIC's principal argument was that "Texas's discovery rule kept the statute of limitations from running before May of 1988." *Id.* Under that rule, "the statute of limitations for legal malpractice actions does not begin to run until 'the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of his cause of action.'" *Id.* at 9a, quoting *Willis v. Maverick,* 760

S.W.2d 642, 646 (Tex. 1988). After reviewing the record, the court of appeals concluded that on the facts of this case the Texas discovery rule had not operated to extend the statute of limitations. *Id.* at 10a.

The court of appeals determined that "[t]he summary judgment record demonstrates that Adams was intimately familiar with [the] transactions and knew the facts that the FDIC contends Shrader & York should have cautioned City and Lamar about." *Id.* "Adams should have discovered, through the exercise of reasonable care and diligence, the losses caused by the schemes and the other facts establishing City and Lamar's legal malpractice claims against Shrader & York." *Id.* at 12a. The FDIC argued that Adams had been engaged in wrongdoing and that his "knowledge cannot be imputed to City and Lamar because he acted adversely to their interests." *Id.* at 13a. The court agreed that as a matter of Texas law it would "not impute a bank officer or director's knowledge to the bank if the officer or director acts with an interest adverse to the bank." *Id.* at 15a. As to four of the five transactions at issue, however, the court determined that there was no evidence Adams had been acting adversely to the thrifts. *Id.* at 19a-23a. Concerning those four transactions, the court determined that "Adams's knowledge should be imputed to City and Lamar" in accordance with "the generally accepted rule that a bank officer or director's knowledge is imputed to the bank." *Id.* at 12a.

The court of appeals rejected the FDIC's argument that it was entitled to "special status as successor to the FSLIC receiver" and could not be held "to the general rule of imputation." *Id.* at 13a. The court pointed out that the FDIC had brought suit not as receiver but as assignee and that, as a mere assignee, it "could only recover 'those damages potentially available to [its] assignor.'" *Id.* at 14a, quoting *FDIC v. Ernst & Young*, 967 F.2d 166, 169 (5th Cir. 1992). Because the statute

of limitations already had run against the thrifts prior to the assignment of their claims to the FSLIC, "the FSLIC acquired only stale claims." *Id.* at 15a.[2]

The court of appeals agreed with the FDIC that in one of the transactions ("the Brazos merger") Adams may have been acting adversely to Lamar. *Id.* at 23a. But the court explained that even if Adams's knowledge concerning that transaction was not imputable to Lamar, "the record reveals that Lamar's Board of Directors had a considerable amount of concrete information about the Brazos merger that should have put it on notice of potential legal malpractice claims arising out of Shrader & York's work on that merger." *Id.*[3]

REASONS FOR DENYING THE PETITION

The Fifth Circuit correctly decided this case. Its decision does not conflict with any decision of this Court or of any other circuit, and the case does not otherwise warrant plenary review.

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[2] The court of appeals further pointed out that if the FDIC had been acting as receiver rather than as assignee, and thus had stood "in the shoes of depositors and other creditors," it would have had no cause of action at all: "the FDIC has not pled or offered summary judgment evidence that City and Lamar's depositors and other creditors were clients of Shrader & York," and " '[u]nder Texas law, an attorney can be held liable for professional malpractice only to a person with whom the attorney has privity, meaning a client.' " *Id.*, quoting *Thomas v. Pryor*, 847 S.W.2d 303, 304 (Tex. App.—Dallas 1992), *writ granted and judgment vacated*, 37 Tex. Sup. Ct. J. 96 (Nov. 3, 1993).

[3] In view of its disposition of the case, the court of appeals had no occasion to consider respondents' further arguments in support of affirmance. In particular, the court did not rule upon the respondents' contention, grounded in the record, that in connection not only with the Brazos merger but also with the four transactions in which Adams was not acting adversely to the thrifts, the respective boards of directors had known or should have known of the facts relevant to the claims of legal malpractice even apart from Adams's own knowledge.

1. *The decision below is correct.* As amended by FIRREA, section 11 of the Federal Deposit Insurance Act, 12 U.S.C. § 1821, extends the statute of limitations with respect to certain claims asserted by the FDIC as conservator or receiver of the assets of a failed thrift. The Solicitor General, however, apparently concedes that this statutory provision does not act to revive claims that had expired before FIRREA's effective date in 1989. The Fifth Circuit's holding on this point reflected the settled rule that "[i]n the absence of a contrary legislative purpose, 'subsequent extensions of a statutory limitation period will not revive a claim previously barred.'" *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990), quoting *Davis v. Valley Distributing Co.*, 522 F.2d 827, 830 (9th Cir. 1975). Because no such contrary legislative purpose is expressed in FIRREA, the courts that have considered the matter all agree that FIRREA does not operate to revive stale claims. *See, e.g., FDIC v. Regier Carr & Monroe*, 996 F.2d 222, 225 (10th Cir. 1993); *FDIC v. Belli*, 981 F.2d 838, 842 (5th Cir. 1993); *FDIC v. McSweeney*, 976 F.2d 532, 534 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2440 (1993). A contrary construction would, as the district court noted, lead to the absurdity that "the FDIC's acquisition of a failed institution would revive a claim even though it might be 20 or 30 years old." Pet. App. 29a.

Consequently, as the Solicitor General apparently recognizes, no federal statute served to extend or toll the operation of the Texas statute of limitations in this case. In these circumstances, the controlling rule of law is that articulated by this Court in *Guaranty Trust Co. v. United States*, 304 U.S. 126, 141-43 (1938): if a claim held by an assignor is time-barred by applicable local law prior to its assignment to the federal government, it remains time-barred in the hands of the United States as assignee. The United States acquires by assignment only "whatever rights then survived the running of the statute against" its assignor. *Id.* at 142. Whether the statute ran against

the assignor prior to assignment is purely a question of state law, and there is no basis for applying federal tolling principles or affording the federal government special protection. *See FDIC v. Dawson*, 4 F.3d 1303, 1309 (5th Cir. 1993). This rule has been consistently applied by the circuits in numerous cases involving the FDIC. *See, e.g., Regier Carr & Monroe*, 996 F.2d at 225 ("stale claims may not be revived by transfer to a federal agency"); *FDIC v. Hinkson*, 848 F.2d 432, 434 (3d Cir. 1988) ("If the state statute of limitations has expired before the government acquires a claim, it is not revived by transfer to a federal agency"); *FDIC v. Former Officers & Directors of Metropolitan Bank*, 884 F.2d 1304, 1309 n.4 (9th Cir. 1989), *cert. denied*, 496 U.S. 936 (1990) (same). *See also Randolph v. Resolution Trust Corp.*, 995 F.2d 611, 619 (5th Cir. 1993).

That really is all this case is about. It is now undisputed that the acts allegedly constituting legal malpractice all occurred, and should have been discovered by the thrifts in the exercise of reasonable care and diligence, more than two years before the thrifts' assets, including tort claims, were assigned to the FSLIC. While still held by the thrifts, the claims of legal malpractice had become time-barred by the Texas two-year statute of limitations. Thus here, as in *Guaranty Trust*, "the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor." *Guaranty Trust*, 304 U.S. at 142. Under the doctrine of *Guaranty Trust*, the claims of legal malpractice remained time-barred in the hands of the FSLIC and the FDIC as the federal assignees.

The Solicitor General misapprehends this central point. He incorrectly characterizes the judgment below as resting on a purported determination "that the knowledge of wrongdoing held by Adams—the principal insider—should be attributed *to the FDIC*." Pet. 6 (emphasis added). The judgment in fact rests on the Fifth Circuit's determi-

nation that "Adams's knowledge should be imputed to *City and Lamar*." Pet. App. 12a (emphasis added). Because Adams's knowledge was attributable to the thrifts more than two years prior to their failure and the resulting assignment of their assets to the FSLIC, the claims had become time-barred before they were assigned. The question whether Adams's knowledge could be attributed to the FDIC is simply not fairly presented on these facts.

To be sure, the FDIC's contentions created some confusion about this point below. The FDIC urged that even when, as in this case, it limits its claims to that of an assignee, it is exempt from "the general rule of imputation." Pet. App. 13a. But that argument, which the court of appeals rejected,[4] was merely a red herring. This case does not turn on the imputation of knowledge to the FDIC. It is sufficient that the thrifts themselves had actual or constructive knowledge bearing upon the claims of legal malpractice and that, as a result, the statute of

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[4] The court explained that it had rejected the argument in *FDIC v. Ernst & Young*, 967 F.2d 166 (5th Cir. 1992). The court described *Ernst & Young* as a case where it had held that "the bank officer's knowledge, which would have been imputed to the bank, was imputable to the FDIC." Pet. App. 14a. In actuality, that case, like this one, turned solely on imputation of knowledge to the bank and not to the FDIC. In *Ernst & Young*, the FDIC had brought suit as assignee of an insolvent thrift, asserting a claim against an accounting firm for negligently auditing the thrift; under Texas law, a necessary element of the claim was proof that the thrift had relied upon the audit; the record demonstrated that Jarrett E. Woods, the thrift's chief executive officer and sole shareholder, knew of the thrift's actual financial condition and thus had not relied upon the faulty audit; because Woods was not acting adversely to the thrift's interests, his knowledge was properly attributable to the thrift; consequently, the FDIC was unable to establish a necessary element of its claim. 967 F.2d at 168-72. The court acknowledged that "certain situations require the courts to treat the FDIC differently from other assignees." *Id.* at 169. But the court saw no reason to relieve the FDIC from the burden, which would have been borne by the thrift or any other assignee, of proving every element of its claim. *Id.* at 169-70.

limitations had run prior to the assignment of those claims to the FSLIC. As the Fifth Circuit explained, "[i]f City and Lamar knew what Adams knew, before May of 1986, the FSLIC acquired only stale claims against Shrader & York when it was appointed receiver." *Id.* at 15a. That conclusion follows directly from *Guaranty Trust* and is plainly correct.[5]

2. *There is no conflict.* The Solicitor General contends that the decision below conflicts with the Ninth Circuit's holding "on the same issue" in *FDIC v. O'Melveny & Myers*, 969 F.2d 744 (9th Cir. 1992), petition for cert. pending, No. 93-489. Pet. 4. But the cases do not involve the same issue, and there is no conflict on the question actually presented in this case.

In *O'Melveny & Myers* the FDIC, acting in its capacity as receiver (and not just as assignee) of a failed thrift, sued for legal malpractice on the theory that the defendant law firm had failed to make a reasonable investigation when preparing a private placement memorandum on the thrift's behalf. The law firm countered that the thrift itself would have been estopped from asserting such a claim because the thrift's own officers had committed the wrongdoing that the law firm had failed to uncover, and that the FDIC therefore should be estopped as well. The Ninth Circut rejected both halves of this argument: the court reasoned that because the thrift's officers "were acting adversely to [the thrift] and not on its behalf, principles of corporate identity and agency law preclude attribution," and thus the thrift itself would not have been estopped, 969 F.2d at 749-51; and the court held, in the alternative, that even if the officers' conduct had been properly attributable to the thrifts, as a matter of federal common law "equitable defenses good against a bank do not carry over against a bank's receiver." *Id.* at 751.

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[5] Of course, Congress could have changed the rule of *Guaranty Trust*, as applied to cases such as this, when it enacted FIRREA. But Congress chose not to do so.

The differences between this case and *O'Melveny & Myers* are manifest. In *O'Melveny & Myers* the FDIC was acting as receiver and thus as the representative of creditors and depositors; the issue was whether the thrift's own inequitable conduct would bar the FDIC from recovering on the creditors' and depositors' behalf. In contrast, the FDIC in this case is acting on its own behalf as assignee and thus stands in the shoes of the assignor thrifts.[6] The issue here is whether the thrifts' failure to assert their claims within the time allowed by the statute of limitations precludes the subsequent assertion of those stale claims by the FDIC as assignee; this issue, unlike the one in *O'Melveny & Myers,* is squarely controlled by *Guaranty Trust.*

Moreover, on the issue actually involved in this case the Fifth and Ninth Circuits are in complete and express agreement. The Ninth Circuit has made this clear in at least two cases involving the FDIC. In *McSweeney,* the Ninth Circuit expressly stated that "[t]he FDIC may not . . . revive claims for which the state limitations period has expired before the date of federal receivership." 976 F.2d at 534. And in *Former Officers and Directors of Metropolitan Bank,* the Ninth Circuit similarly explained:

> It is settled law that state limitations statutes are relevant in determining a claim's viability at the time the federal agency acquires the claim. If the state statute of limitations has expired before the government acquires a claim, that claim is not revived by transfer to a federal agency.

884 F.2d at 1309 n.4. The Fifth and Ninth Circuits plainly are not in conflict on this issue.

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[6] The petitioner in *O'Melveny & Myers* incorrectly asserts that in this case, "unlike in *Ernst & Young*, the FDIC purported to sue not only on behalf of the failed bank but also on behalf of depositors and creditors." Pet. 93-489 at 13. In fact, the Fifth Circuit carefully reviewed the record here and determined that on this point this case is "indistinguishable" from *Ernst & Young,* Pet. App. 14a, where the "most significant factor" had been "the FDIC's decision to sue only as . . . assignee." *Ernst & Young,* 967 F.2d at 169.

Nor does the decision below conflict with *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942). The Solicitor General implies that *D'Oench, Duhme* broadly "requires articulation of uniform rules of federal law that protect federal receivers against claims and defenses that might have been successful against the institution," Pet. 5, but that is incorrect. In *D'Oench, Duhme* and its precursor, *Dietrick v. Greaney*, 309 U.S. 190 (1940), the Court was concerned with the problem created when a bank and an accommodation maker of a note enter into a secret agreement, not reflected on the bank's books, that the note will not be called for payment. The Court identified a federal statutory policy protecting against "misrepresentations as to the securities or other assets in [banks'] portfolios." *D'Oench, Duhme*, 315 U.S. at 457. Accordingly, the Court held that the accommodation maker would not be permitted to assert the secret agreement as a defense "as against the receiver of the bank and its creditors, or at times even as against the bank itself, where his act contravenes a general policy to protect the institution of banking from such secret agreements." *Id.* at 458. *See also, e.g., Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1248 (5th Cir. 1990). The rule thus applied in *D'Oench, Duhme* and *Greaney* is narrow both in its scope and in its rationale. That rule has nothing to do with the prosecution of routine tort claims of the sort asserted by the FDIC in this case.

Some courts, expanding upon *D'Oench, Duhme*, have reasoned that a uniform federal rule should govern all equitable defenses of "estoppel, waiver, and unjust enrichment" that may be asserted against the FDIC in its capacity as receiver. *FDIC v. Gulf Life Ins. Co.*, 737 F.2d 1513, 1517 (9th Cir. 1984). That approach, which the Ninth Circuit apparently followed in *O'Melveny & Myers*, extends *O'Oench, Duhme* considerably further than is warranted by its original rationale. But whether or not such an extension of *D'Oench, Duhme* is sound as applied to cases where the FDIC is acting as receiver, it can have no application where, as here, the FDIC is act-

ing solely as assignee. This Court has expressly held that when the federal government acts as a mere assignee, it is subject to the same equitable defenses that would be available against the assignor. *Dietrick v. Standard Surety & Cas. Co.*, 303 U.S. 471, 479-80 (1938). In any event, the issue here does not concern an equitable defense, as in *O'Melveny & Myers*, but the legal defense of limitations. The Solicitor General points to no decision by any court of appeals, and we are aware of none, that ever has gone so far as to read *D'Oench, Duhme* as authorizing or requiring the revival of claims that were time-barred by state law prior to their assignment to the FDIC.

3. *There is no other reason for granting review of this case.* The Solicitor General argues that "the rule of federal law should not permit tortfeasors to escape liability because insiders of the failed institution were aware of . . . the wrongdoing." Pet. 5. As a general proposition, that seems plainly incorrect. The very essence of a statute of limitations is that tortfeasors may indeed escape liability if the injured person was aware of the wrongdoing and failed to bring suit. "These enactments are statutes of repose; . . . they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Of course, there are circumstances in which an insiders' awareness of a third party's wrongdoing cannot fairly be imputed to the institution; as the Fifth Circuit recognized, it may well be improper to "impute a bank officer or director's knowledge to the bank if the officer or director acts with an interest adverse to the bank." Pet. App. 15a. But that consideration does not require or justify the introduction of novel rules of federal common law. By denying any imputation of knowledge when the knowledgeable insider has acted adversely to the institution, and by thus tolling the statute of limitations,

"Texas's discovery rule adequately addresses the FDIC's policy concerns." *Id.* at 25.

Finally, it is telling that the Solicitor General does not claim that the narrow issue actually involved in this particular case is common or recurrent. To the contrary, he concedes that "the equitable defense context in which the issue of attribution arises in *O'Melveny & Myers* is more common in pending litigation than is the statute of limitations context in which it arises here." Pet. 8. Moreover, in those instances in which the FDIC has sought to assert time-barred claims, the circuits consistently have held, as the Fifth Circuit did here, that such claims may not be revived through the legerdemain of federal common law. *See* p. 7, *supra*. In short, this is neither an important issue nor one on which the lower courts stand in need of guidance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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